

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

STEVEN A. SWAN,)	
)	
Plaintiff)	
)	
v.)	
)	N.H. Civ. No. 1: 06-458
PAUL J. BARBADORO, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION AFTER SCREENING
CIVIL RIGHTS COMPLAINT**

Steven Swan, who is currently serving a federal sentence for income tax offenses, has filed a civil complaint against nineteen defendants and "unknown others." In this complaint Swan accuses the defendants -- who were involved in different capacities in his criminal case -- of violating the Racketeer Influenced and Corrupt Organizations statute. Swan is proceeding in forma pauperis in this action.¹ All the judges of the District of New Hampshire having recused themselves, the case was transferred to the District of Maine.

In this recommended decision I screen Swan's complaint pursuant to the District of New Hampshire Local Rule 4.3(d)(2)² and 28 U.S.C. § 1915A(a), which provides:

¹ In my order granting Swan leave to proceed in forma pauperis, consistent with the practice of the District of Maine I gave Swan until February 8, 2007, to notify the court if he wanted to proceed given that he would be obligated to pay the full \$350.00 filing fee as funds became available. On January 19, 2007, Swan wrote a letter (which was docketed on January 23, 2007) in response to that order which unequivocally expresses his intent to proceed with the action and incur the cost of the full filing fee.

² This rule provides:

(2) Incarcerated Plaintiffs. The clerk's office shall forward initial filings and any subsequent amendments to those filings by inmates to the magistrate judge for

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(a),(b).³

The named defendants in this action are: United States District Court Judge, Paul Barbadoro; United States Attorney Thomas Colantuono; Assistant United States Attorneys William Morse and Peter Papps; United States Department of Justice Trial Attorney, James Chapman; Head of the Criminal Division of the United States Attorney's Office for the District of New Hampshire, Donald Feith; IRS Special Agent, Roberta Keenan; United States District Court for the District of New Hampshire Court

preliminary review, whether or not a filing fee has been paid, pursuant to 28 U.S.C. § 1915A(a). After the initial review, the magistrate judge may:

(A) report and recommend to the court that the filing, or any portion of the filing, be dismissed because:

(i) the allegation of poverty is untrue, the action is frivolous, malicious, or fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief under 28 U.S.C. § 1915A(b); or

(ii) it fails to establish subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1);

(B) grant the party leave to file an amended filing in accordance with the magistrate's directives; or

(C) pursuant to Fed. R. Civ. P. 4(c)(2), appoint a person to effect service if the incarcerated person is proceeding in forma pauperis, or pursuant to Fed. R. Civ. P. 4(b), order the clerk's office to issue summons(es) against the adverse party if the inmate paid the filing fee, in which event the action shall proceed as all other actions.

Dist. Nh. Loc. R. 4.3(d)(2).

³ On January 3, 2007, Swan filed another action seeking declaratory relief against twelve of the defendants named in this action. That action contains many overlapping factual allegations apropos the defendants' conduct in handling his criminal and civil cases. That case has been transferred to the District of Maine and Swan's application to proceed in forma pauperis is still in process so it is not yet ripe for a recommendation under 28 U.S.C. § 1915A and the District of New Hampshire Local Rule 4.3(d)(2).

Reporter, Celeste Quimby; Clerk of the United States District Court of New Hampshire, James Starr; Deputy Clerk of the United States District Court of New Hampshire, Marianna Michaelis; Chief United States Probation Officer for the District of New Hampshire, Thomas Tarr; Deputy Chief United States Probation Officer for the District of New Hampshire, Peter Russo; United States Probation Officer for the District of New Hampshire, Cathy Battistelli; First Circuit Court of Appeals Judges Juan Torruella, Sandra Lynch, and Kermit Lipez; United States Magistrate Judge for the District of Rhode Island, Jacob Hagopian; United States District Judge, Ernest Torres; "An Unknown Motions Judge" for the First Circuit Court of Appeals; and "Others unknown who were complicit in deciding to prosecute" him.

Swan's 2005 Civil Action

With respect to six of these defendants – Judge Barbadoro, Court Reporter Quimby, Attorneys Morse, Chapman and Coluntuono, and the unknown First Circuit motions judge -- in 2005 Swan filed a civil action (R.I. Civ. No. 05-491-T; N.H. Civ. No. 05-401-ECT) against them in the District of New Hampshire which was transferred to the District of Rhode Island after the recusal of the New Hampshire judges. The factual allegations of that thirteen-page complaint have been integrated into the complaint now before me.

In the 2005 action the Rhode Island District Judge Torres issued an order to show cause requiring that Swan explain why his case should not be dismissed for lack of prosecution because he had not served the named defendants. In a report and recommendation, the Magistrate Judge rejected Swan's argument (filed in response to that order) that Swan's failure to effectuate service of the defendants was justified in light

of the failure of the Rhode Island Magistrate Judge to undertake a District of New Hampshire Local Rule 4(d)(2) screening. The Magistrate Judge concluded that, while the local rule allowed a magistrate judge to order the clerk's office to issue summonses after a review of the complaint, it did not mean that such an order was mandatory and that the onus to assure service remained Swan's, as the plaintiff. In the alternative, the Magistrate Judge found "a separate, independent basis for the dismissal":

In his amended complain, plaintiff alleges a federal court jury convicted him of criminal offenses. Plaintiff alleges that the named defendants here – the federal judge that presided at his trial, the court reporter, and the federal prosecutors in his criminal matter, denied him his right to counsel in violation of the Sixth Amendment and violated his right to due process under the Fifth Amendment. Plaintiff also claims that an unknown First Circuit Court of Appeals judge refuses to rule on a motion he filed in that venue, in his criminal appeal, in violation of his due process rights.

Section 1915A of Title 28 of the United States Code directs the Court to review a prisoner complaint before docketing or soon thereafter to identify cognizable claims or dismiss the complaint if it fails to state a claim upon which relief can be granted. 28 U.S.C. § 1915A; see also 28 U.S.C. § 1915(e)(2). Pursuant to that directive, I find that the amended complaint fails to state a claim upon which relief can be granted.

Plaintiff alleges essentially that constitutional errors occurred at his trial, sentencing, and on ongoing criminal appeal, and, as a result, his conviction and/or sentence i[s] unlawful. However, when filing a Section 1983 or Bivens action alleging an unconstitutional conviction, or for other harm caused by actions whose unlawfulness would render the conviction or sentence invalid, a plaintiff must demonstrate that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a tribunal authorized to make such determination, or called into question by a court's issuance of a writ of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 486-497 114 S.Ct. 2364, 2372-3(1994). An inmate's civil rights claim "is barred (absent prior invalidation) – no matter the relief sought ..., no matter the target of the prisoner's suit ... -- if success in that action would necessarily demonstrate the invalidity of confinement or its duration." Wilkinson v. Dotson, 544 U.S. 74, 125 S.Ct. 1242 (2005).

Here, neither plaintiff's conviction nor his sentence has been invalidated. A decision in this matter that the plaintiff's constitutional rights were violated during his trial, sentencing or appeal would necessarily call into question the validity of his conviction or sentence. That is something that this Court cannot do here. See id. Accordingly, I

find that plaintiff's amended complaint fails to state a claim upon which relief can be granted and should be dismissed. I so recommend.

(Report and Recommendation at 4-5, R.I. Civ. No. 05-491-T, Docket No. 15.)

In an order of dismissal, District Court Judge Torres agreed with the Magistrate Judge that the New Hampshire Local Rule in question permits, but did not require, a magistrate judge to appoint someone to effect service and to order the clerk to issue summonses. (Order of Dismissal at 2; R.I. Civ. No. 05-491-T, Docket No. 20.) The District Judge also agreed in principle with the Magistrate Judge's finding that under Heck v. Humphrey Swan failed to state a claim for which relief could be granted because he had not alleged that his conviction had been reversed, expunged, or declared invalid. (Id.) However, the District Court Judge did not base its decision on this ground because the show cause order did not provide Swan with sufficient notice and the opportunity to address that issue. (Id.)

Both the Magistrate Judge and the District Court noted in their decisions that Swan was not proceeding in forma pauperis, and – mistakenly - indicated that he had not paid the filing fee. The New Hampshire docket demonstrates that he did pay the full filing fee at the time he filed the complaint.

Swan's Previously Dismissed 2006 Civil Action

In 2006 Swan lodged yet another civil action challenging the conduct of a selection of the defendants to this action apropos his federal criminal prosecution. The defendants in that action were: United States District Court Judge, Paul Barbadoro; United States Attorney Thomas Colantuono; Assistant United States Attorneys William Morse and Peter Papps; United States Department of Justice Trial Attorney, James Chapman; Head of the Criminal Division of the United States Attorney's Office for the

District of New Hampshire, Donald Feith; IRS Special Agent, Roberta Keenan; and other unknown United States government officials. The allegations of Swan's prior 2006 complaint echo many of the allegations in this, a lengthier, complaint. He contends that the IRS put his real estate business out of business and he maintains that he was investigated by the IRS because of his "income tax activities" and after Swan voiced his opinion that neo-conservatives in the Bush Administration, in conjunction with the Israeli lobby and the Mossad, were behind the September 2001 attacks. It was these positions, Swan theorizes, that made him a target of a selective prosecution. He sets forth allegations meant to suggest that the investigators, government attorneys and trial judge conspired in this selective prosecution in retaliation for his exercise of his First Amendment Rights..

This case, like the 2005 action, was transferred from the District of New Hampshire to the District of Rhode Island. (N.H. Civ. No. 06-88-SM, R.I. M Civ. No. 06-018-T.) Screening this complaint pursuant to the directive of 28 U.S.C. § 1915A and citing the New Hampshire Local Rule 4.3(d)(2), the court concluded that the complaint failed to state a claim for which relief could be granted. In a report and recommendation the Magistrate Judge reasoned:

Plaintiff alleges essentially that errors occurred prior to his trial and at his trial, and, as a result, his conviction and/or sentence is unlawful. However, when filing a Section 1983 or Bivens action alleging an unlawful conviction, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a plaintiff must demonstrate that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a tribunal authorized to make such determination, or called into question by a court's issuance of a writ of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 486-487 (1994). An inmate's civil rights claim "is barred (absent prior invalidation) – no matter the relief sought ..., no matter the target of the prisoner's suit ... -- if success in that action would necessarily demonstrate

the invalidity of confinement or its duration." Wilkinson v. Dotson, 544 U.S. 74 (2005).

Here, neither plaintiff's conviction nor his sentence has been invalidated. A decision in this matter that the plaintiff's constitutional rights were violated during the pretrial stages or at trial would necessarily call into question the validity of his conviction or sentence. That is something that this Court cannot do here. See id.

Moreover, to the extent that the plaintiff seeks to be released from custody, a prisoner has no cause of action under Bivens to challenge the very fact or duration of his physical imprisonment. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). His sole federal remedy lies in a writ of habeas corpus. Id.

(Report and Recommendation at 2-3, R.I. M. Civ. 06-019-T, Docket No. 11.) This recommendation was accepted by the District Court Judge (R.I. M. Civ. 06-019-T, Docket No. 16) and the case was dismissed (id., Docket No. 17).

Screening of this New Hampshire Civil 06--458 Complaint

The complaint now before the court for screening under 28 U.S.C. § 1915A and New Hampshire Local Rule 4.3 (d)(2) charges the defendants with violating the Racketeer Influenced and Corrupt Organizations, a.k.a. RICO, statute.⁴ Paragraphs 23 through 60 of the complaint set forth factual allegations which all concern the conduct of the defendants – save Rhode Island's Magistrate Judge Hagopian and District Court Judge Torres – apropos the investigation, prosecution, sentencing, and direct appeal review of Swan's criminal case. With regards to Magistrate Judge Hagopian and District Court Judge Torres, Swan challenges the decision to dismiss his 2005 complaint for failure to prosecute, emphasizing the misrepresentation in the Report and Recommendation and the Order of Dismissal that Swan had not paid the filing fee when in fact he had.

⁴ Thus, while the earlier 2006 complaint cited his legal claim as conspiracy to selectively prosecute him in retaliation for the exercise of his First Amendment rights, this complaint charges a conspiracy under the RICO statute.

In his complaint Swan represents that he is serving his sentence at the Federal Medical Center, in Ayer, Massachusetts. (Compl. ¶ 3.) He was convicted by the jury on February 12, 2004. (Id. ¶ 46.) He was originally sentenced on June 24, 2004 (id. ¶ 52), and, Blakely v. Washington, 542 U.S. 296 (2004) having been decided the very day of his sentencing, Swan was re-sentenced on July 21, 2004 (Compl. ¶ 55). Swan filed a notice of appeal on August 3, 2004. (Id. ¶ 58.) Swan also filed a motion to correct the record concerning what Swan perceived to be the denial of the trial judge of the assistance of standby counsel during the sentencing phase, as well as a motion to compel Judge Barbadoro to correct the record. (Id. ¶¶ 58,59.) The First Circuit Court of Appeals, with the defendants Torruella, Lynch, and Lipez sitting on the panel, affirmed his conviction on July 6, 2006, (id. ¶ 60) and the United States Supreme Court denied his petition for certiorari review (id.) On October 2006, Swan filed a 28 U.S.C. § 2255 motion to vacate in the District of New Hampshire and that case, having also been transferred to Rhode Island, is pending. (N.H. Civ. No. 06-404.)

Turning to the screening of the present complaint, on the face of the complaint and the dockets, it is evident that Swan has yet to obtain any relief vis-à-vis his federal conviction. The United States Supreme Court has just issued its decision in Jones v. Bock, __ U.S. __, 2007 WL 135890 (Jan. 22, 2007) which, while focusing on the pleading standard for 42 U.S.C. § 1997e exhaustion, gave guidance to lower federal courts undertaking their 28 U.S.C. § 1915A screening responsibilities. Apropos 28 U.S.C. § 1915A(b)(1) dismissal for failure to state a claim when an affirmative defense is implicated by the complaint, the Court explained:

A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the

allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim; that does not make the statute of limitations any less an affirmative defense, *see* Fed. Rule Civ. Proc. 8(c). Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract. *See Levetto v. Lapina*, 258 F. 3d 156, 161 (CA3 2001) (“[A] complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense ... appears on its face” (internal quotation marks omitted)). *See also Lopez-Gonzalez v. Municipality of Comerio*, 404 F. 3d 548, 551 (CA1 2005) (dismissing a complaint barred by the statute of limitations under Rule 12(b)(6)); *Pani v. Empire Blue Cross Blue Shield*, 152 F. 3d 67, 74-75 (CA2 1998) (dismissing a complaint barred by official immunity under Rule 12(b)(6)). *See also* 5B C. Wright & A. Miller, Federal Practice and Procedure §1357, pp. 708-710, 721-729 (3d ed. 2004).

2007 WL 135890 at *10. Given that the complaint allegations concerning the investigation, prosecution, conviction, sentencing, and the direct appeal are a direct attack on the validity of his conviction, and because this Heck infirmity is patently clear from his own allegations and the relevant dockets,⁵ I conclude that the action against the New Hampshire defendants and the First Circuit Court of Appeals Judges⁶ should be dismissed for failure to state a claim for which relief can be granted.⁷

⁵ The First Circuit has not expressly weighed in on the question of whether the Heck bar is an affirmative defense or is jurisdictional, *see e.g., Jiron v. City of Lakewood*, 392 F.3d 410, 413 n.1 (10th Cir. 2004) (citing *Okoro v. Bohman*, 164 F.3d 1059, 1061 (7th Cir. 1999)); *Okoro v. Bohman*, 164 F.3d 1059, 1061 (7th Cir. 1999) (“Heck defense is not jurisdictional.”), but viewing it as an affirmative defense that should be analyzed through the *Jones v. Bock* prism gives Swan the benefit of the doubt.

⁶ Just to be crystal clear these defendants are: United States District Court Judge, Paul Barbadoro; United States Attorney Thomas Colantuono; Assistant United States Attorneys William Morse and Peter Papps; United States Department of Justice Trial Attorney, James Chapman; Head of the Criminal Division of the United States Attorney’s Office for the District of New Hampshire, Donald Feith; IRS Special Agent, Roberta Keenan; United States District Court for the District of New Hampshire Court Reporter, Celeste Quimby; Clerk of the United States District Court of New Hampshire, James Starr; Deputy Clerk of the United States District Court of New Hampshire, Marianna Michaelis; Chief United States Probation Officer for the District of New Hampshire, Thomas Tarr; Deputy Chief United States Probation Officer for the District of New Hampshire, Peter Russo; United States Probation Officer for the District of New Hampshire, Cathy Battistelli; and First Circuit Court of Appeals Judges Juan Torruella, Sandra Lynch, and Kermit Lipez.

⁷ As to the defendants named in the 2006 complaint there is also a credible case to be made that the action against them is barred by the doctrine of res judicata. With respect to the defense of absolute immunity of the judicial defendants, Swan has expressly stated that he is not seeking monetary damages

As to Magistrate Judge Hagopian and District Court Judge Torres, their conduct in the prior civil action does not raise a straightforward Heck concern. However, it is evident that Swan's addition of these two jurists to his line-up of defendants is blatantly frivolous and the claims against them should be dismissed pursuant to 28 U.S.C.

§ 1915A(b)(1) on that ground. In Paragraphs 62 and 63 of his complaint Swan alleges:

Pursuant to the Local Civil Rules of the District of New Hampshire (which still were applicable even though the case had been transferred to Rhode Island), because my case was filed by me as an incarcerated, pro se plaintiff, it was supposed to have been screened by a magistrate judge and approved before the clerk was ordered to issue the summonses to me to be served on each of the defendants. When my case was transferred to the District of Rhode Island, this chore fell to the Senior Magistrate Judge Jacob Hagopian, now a defendant in this case. However, Defendant Hagopian failed to do anything.

Then on April 4, 2006, after the 120-day time period for me to serve the complaint and summonses pursuant to Federal Rule of Civil Procedure 4 had expired, Defendant Magistrate Hagopian issued a Report and recommendation to the court (Defendant Judge Torres) that my complaint be dismissed because of my alleged failure to prosecute the complaint. Defendant Magistrate Judge Hagopian also erroneously recommended that my complaint be dismissed because I had not paid the filing fee nor had I petitioned to proceed in forma pauperis, even though I had paid the filing fee. On May 11, 2006, I mailed my Objection to Defendant Hagopian's Report and Recommendation to the court. In it, I explained that Defendant Hagopian had prevented me from prosecuting my case because he had not screened and approved the complaint and ordered the clerk to issue the summonses. I also submitted evidence that I had paid the filing fee. However, on May 25, 2006, Defendant Judge Torres accepted Defendant Hagopian's Report and Recommendation and he dismissed my action.

(Compl. ¶¶ 62-63.) The references in the two Rhode Island opinions concerning Swan's failure to pay the filing fee had no determinative bearing on the merits of the determination that Swan had failed to prosecute his case by not assuring that service was

from the federal judges (an assertion that makes it even more evident that the relief he seeks is from his conviction and sentence, relief that is barred under the Heck doctrine).

made on the defendants. Swan's assertion that these two defendants were part of a RICO conspiracy stemming from his New Hampshire prosecution is, at best, frivolous.

Conclusion

For the reasons set forth above, I recommend that the Court dismiss this complaint pursuant to 28 U.S.C. § 1915A(b)(1).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

January 24, 2007.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

Swan v. Barbadoro et al
Assigned to: Chief Judge George Z. Singal
Related Case: [1:03-cr-00036-PB](#)
Cause: 18:1961 Racketeering (RICO) Act

Date Filed: 01/08/2007
Jury Demand: None
Nature of Suit: 470
Racketeer/Corrupt Organization
Jurisdiction: Federal Question

Plaintiff

Steven A. Swan

represented by **Steven A. Swan**
00259-049 Camp
Federal Medical Center - Devens
P.O. Box 879
Ayer, MA 01432
PRO SE

V.

Defendant

Paul J. Barbadoro

*U.S. District Judge, District of
New Hampshire, in his individual
and official capacities*

Defendant

Thomas P. Colantuono

*U.S. Attorney, District of New
Hampshire, in his individual and
official capacities*

Defendant

William E. Morse

*Assistant U.S. Attorney, District of
New Hampshire, in his individual
and official capacities*

Defendant

Peter E. Papps

*First Assistant U.S. Attorney,
District of New Hampshire, in his
individual and official capacities*

Defendant

James W. Chapman

*Trial Attorney, U.S. Department of
Justice, in his individual and
official capacities*

Defendant

Donald Feith

*Assistant U.S. Attorney, District of
New Hampshire, in his individual
and official capacities*

Defendant

Roberta Keenan

IRS, Special Agent in Charge, in

*her individual and official
capacities*

Defendant

Celeste A. Quimby

*Court Reporter, U.S. District
Court, District of New Hampshire,
in her individual and official
capacities*

Defendant

James R. Starr

*Clerk, U.S. District Court, District
of New Hampshire, in his
individual and official capacities*

Defendant

Marianne Michaelis

*Deputy Clerk, U.S. District Court,
District of New Hampshire, in her
individual and official capacities*

Defendant

Thomas K. Tarr

*Chief U.S. Probation Officer,
District of New Hampshire, in his
individual and official capacities*

Defendant

Peter Russo

*Deputy Chief U.S. Probation
Officer, District of New
Hampshire, in his individual and
official capacities*

Defendant

Cathy A. Battistelli

*U.S. Probation Officer, District of
New Hampshire, in her individual*

and official capacities

Defendant

Juan R. Torruella

Circuit Judge, U.S. Court of Appeals for the First Circuit, in his individual and official capacities

Defendant

Sandra L. Lynch

Circuit Judge, U.S. Court of Appeals for the First Circuit, in her individual and official capacities

Defendant

Kermit Lipez

Circuit Judge, U.S. Court of Appeals for the First Circuit, in his individual and official capacities

Defendant

Jacob Hagopian

U.S. Magistrate Judge, U.S. District Court, District of Rhode Island, in his individual and official capacities

Defendant

Ernest C. Torres

U.S. District Judge, District of Rhode Island, in his individual and official capacities

Defendant

Unknown Motions Judge

U.S. Court of Appeals for the First

*Circuit, in his individual and
official capacities*

Defendant

Unknown Others

*Others who were complicit in
deciding to prosecute Steven A.
Swan*